OH KEAT SENG

v.

DESAMINIUM JAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[COMPANIES WINDING UP NO: D1-28-794-2003]
24 APRIL 2004

COMPANY LAW: *Winding-up - Petition - Statutory demand - Service - Whether there was proper service of statutory demand and petition on respondent - Companies Act 1965, s. 218(2)(a) - Companies (Winding-Up) Rules 1972, r. 25(1)*

COMPANY LAW: *Winding-up - Petition - Triable issue - Whether debt bona fide disputed - Whether petitioner had locus standi as creditor to file petition - Whether petition an abuse of process of court*

The petitioner, who had been a shareholder cum director with a 2% shareholding in the respondent, presented a petition to wind-up the respondent under s. 218(1)(e) of the Companies Act 1965 ('the Act') due to the respondent's inability to pay a debt of RM408,000 due and payable to the petitioner. The petitioner also issued a statutory demand pursuant to s. 218(2)(a) of the Act demanding payment of the said sum within 21 days failing which winding-up proceedings would be commenced. The respondent refuted the basis of the petitioner's claim and categorically denied that any monies were due to the petitioner at that point in time, contending that the petitioner was aware that the RM408,000 – an advance from the petitioner – would only become 'due and payable' when there were surplus funds in the respondent. The resolution of this matter involved the determination of two issues, namely: (i) whether there was proper service of the statutory demand and the winding-up petition on the respondent; and (ii) whether the sum of RM408,000 was due and payable to the petitioner by the respondent.

Held (dismissing the petition):

[1] On the facts, there was adequate proof of physical delivery of both the statutory demand and the petition on the respondent. There had been no injustice or prejudice occasioned to the respondent by the petitioner effecting service of both the statutory demand and the petition by leaving copies of the same at the respondent's registered office. (p 49 a)

[2] When viewed in the context of the factual matrix presented by the respondent, there was no doubt that there was a *bona fide* dispute as to whether the advance had become a due and payable debt to the petitioner. The triable issue in this case was whether the advance was due and repayable on demand or was it merely a shareholder's advance to provide working capital for the respondent, repayable at a future date contingent upon the state of performance of the respondent's property venture. Clearly, in the circumstances of this case, unless the advance constituted a genuine debt due, the petitioner was not clothed with *locus standi* as a creditor to file this petition; this petition was an abuse of the process of court. (pp 51 h & 53 a-b)

Case(s) referred to:

Chang Chan Thong v. Kemajuan Sri Segera Sdn Bhd [1996] 2 CLJ 471 HC ***(refd)***

Commissioner Wealth Tax v. Harrison and Crossfield Ltd AIR [1965] 209 ***(refd)***

CVC Investment Pty Ltd & Anor v. P & T Aviation Ltd [1989] NSW LR 295 ***(refd)***

Cymun Development Sdn Bhd v. Supermax Sdn Bhd [1996] 1 CLJ 545 HC ***(refd)***

Dayakuasa Holdings Sdn Bhd v. Kayaal Holdings Sdn Bhd [2003] 2 CLJ 391 HC ***(refd)***

In Re Lympe Investments Ltd [1972] 2 All ER 385 ***(refd)***

Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd [2002] 3 AMR 2647 HC ***(refd)***

Lee Po Wang, Samson v. Ever Rise Engineering Ltd [2002] 555 HKCU 1 ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagang Sdn Bhd [2000] 2 CLJ 160 CA ***(refd)***

Malaysian Resouces Corporation Bhd v. Juranas Sdn Bhd [2002] 7 CLJ 260 HC ***(refd)***

Mann & Anor v. Goldstien & Anor [1968] 1 WLR 1091 ***(refd)***

Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd [1993] 1 CLJ 204 HC ***(not foll)***

Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd [1994] 3 CLJ 511 HC ***(foll)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***

Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd [1995] 5 CLJ 145 HC ***(refd)***

Quartz Hill Consolidated Gold Mining Company v. Eyre [1883] Vol XI 674 ***(refd)***

Re Bellador Silk Ltd [1965] 1 All ER 667 ***(refd)***

Re Lympne Investment [1972] 2 All ER 385 ***(refd)***

Re Sanpete Builders (S) Pte Ltd [1989] 1 CLJ 562; [1989] 2 CLJ (Rep) 958 HC ***(refd)***

Stonegate Securities Ltd v. Gregory [1980] 1 Ch 576 ***(refd)***

Wangsiru Sdn Bhd v. Grand United Holdings [1997] 5 CLJ 664 HC ***(refd)***

YJDE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), (2)(a), 350
Companies (Winding-Up) Rules 1972, rr. 25(1), 194(1)

Companies Act 1948 [UK], s. 223

Other source(s) referred to:
JO Donovan, *The Law of Company Liquidation*, 3rd edn, p 84

For the petitioner - Vijay Kumar Natarajan (SC Chan); M/s Kumar Jaspal Quah & Aishah
For the respondent - Stanley Sinnappan (Vazeer Alam); M/s Vazeer Akbar Majid & Co

[The petitioner has appealed to the Court of Appeal vide Appeal No: W-02-166-04]

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

Preamble

The petitioner presented a petition on 30 July 2003 (encl. 1) to wind up the respondent under s. 218(1)(e) for their inability to pay a debt of RM408,000 due and payable to the petitioner.

The petitioner issued a statutory demand pursuant to s. 218(2)(a) (statutory demand) of the Companies Act (the Act) 1965 dated 10 June 2003 (Annexure C Enclosure 1), demanding payment of the said sum within 21 days, failing which he would commence winding up proceedings. The petitioner's statutory demand was preceded by a letter of demand dated 22 May 2003. The respondent refuted the basis of the petitioner's claim and categorically denied that any monies were due to the petitioner at that point in time.

At the outset, solicitors for both parties agreed that the resolution of this matter involved two issues; namely:

(i) whether there was proper service of the statutory demand and the winding up petition (petition) on the respondent (statutory demand); and

(ii) whether the sum of RM408,000 was due and payable to the petitioner by the respondent.

First Issue – The Service

The particulars of the service of the statutory demand are contained in Nagian Ramoo a/l Selaperumal's (Nagian) statutory declaration dated 30 July 2003 (Annexure C Enclosure 1) and corrective statutory declaration dated 6 November 2003 (exh. OKS2 encl. 6) pertaining to the typographical error on the month

of service being June rather than May (which was accepted by the respondent through withdrawal of encl. 13). The petitioner averred that service of the statutory demand was effected by Nagian, a clerk in the petitioner's solicitors' employ, on Wednesday 11 June 2003 at about 4.01pm, by leaving a copy of the same at the respondent's registered address at Bilik 410-A, Bangunan Loke Yew, No: 4, Jalan Mahkamah Persekutuan, 50050 Kuala Lumpur. The petition was similarly served on the respondent by Nagian on Tuesday 2 September 2003 by leaving a sealed copy of same at its aforesaid registered address. The particulars of the service of the petition are contained in his affidavit of service affirmed on 4 November 2003 (encl. 5).

The crux of respondent's complaint is that there was no proper service of the statutory notice because there was no acknowledgement of service by any of their staff or officers. And, that the service of the petition was also defective due to non-compliance with r. 25(1) of the Companies (Winding-Up) Rules 1972 (the Rules), as the affidavit of service pertaining to the petition did not state that he was unable to find any 'member, officer, or servant of the company' to receive them – despite the fact that it was operating at its registered office at the material time. Though nevertheless, the respondent acknowledge that they had received the copy of the statutory demand and Nagian's statutory declaration *via* fax on 10 October 2003; and the fact that the statutory demand and petition was left at its registered office was also not pointedly disputed.

The mode of service of the statutory demand is governed by the provisions of s. 218(2)(a) of the Act which provides:

> A company shall be deemed … if a creditor … has served on the company by leaving at the registered office a demand … requiring the company to pay the sum so due …

As it is not at all seriously disputed that the statutory notice was left by the process server at the registered office of the respondent I would hold that it was served in due compliance with s. 218(2)(a), as restated with precisely the same wording in the global provision (which ought to be accorded due weightage) in s. 350 of the Act which stages that:

> A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

No acknowledgement by its officers is thus necessary and the objection as to service of the statutory demand is overruled. See *Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd* [1994] 3 CLJ 511 wherein Abdul Malek J (as he then was) was eminently correct to hold that:

> **The obvious underlying requirement is that there must be adequate proof of physical delivery to the respondent** which has been fulfilled in the present case as the notice of demand by registered post was in fact actually delivered to the respondent's registered office. (emphasis added)

Service of a petition is governed by the provisions of r. 25(1) of the Rules which states:

> Every petition shall, …, be served upon the company at the registered office of the company … by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at the registered office …

The case of *Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd* [1993] 1 CLJ 204 (Mui Bank Bhd) was cited in support of the Respondent's contention that the affidavit of service should have stated whether a member or officer or servant of the company could not be found. In *Mui Bank Bhd* Chong Siew Fai J (as he then was) had opined that:

> Since the petitioner chose to effect service of the petition by leaving a copy thereof at the registered office, it must be clearly established by evidence in the affidavit of service or otherwise that at the time of leaving the copy at the company's registered office, no member, officer or servant of the company could be found in the registered office. Such evidence, however, is singularly lacking.

With the greatest respect, after careful study and consideration, I am impelled to take a wholly different approach from my learned brother Chong Siew Fai J (as he then was) on the appropriate construction to be placed on r. 25(1) of the Rules pertaining to service of the petition, for the following reasons:

(a) The courts should not adopt the literal approach in interpreting the Act or the Rules relating to the winding up of companies as this would be inconsistent with the legislative scheme underlying such provision. (See *YJDE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd* [1996] 3 CLJ 51 and also *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagang Sdn Bhd* [2000] 2 CLJ 160 – a Court of Appeal decision.) In this regard, we must be mindful that case authorities on bankruptcy should not be invoked as an aid to interpret the Winding-Up Rules and the Act as the Bankruptcy Enactment and Rules are specially tailored to cater for proceedings in persona against an individual whereas the Companies Act and Rules provide for proceedings in rem against a company.

(b) The primary purpose and rationale of service of any process is to give notice to an affected party so that they may be aware of and may, if they so wish, resist that which is sought against them. Thus, whereas the primary purpose of the requirement of advertisement and gazettal of the petition is to give notice to the public and the uninformed creditors of the fact that a petition has been filed, yet the collateral effect of such requirement is to give added notice to the respondent company.

(c) It is most probable and consistent with normal human conduct that the server of the petition would, upon arrival at the registered office of the company, have first ascertained whether any member, officer or servant of the company was present and ready to acknowledge receipt of a copy of the petition before leaving same at the office. Furthermore, it is my considered view that the phrase "or in case no such member, officer, or servant can be found there, …" is only directory (or instructive) in nature but not mandatory in import, to the extent that requires this phrase to be set out in the affidavit of service. Hence, the failure to set this phrase out in the affidavit of service is of no consequence, and it does not affect the validity of the service.

(d) Thus, in *The Law of Company Liquidation*, 3rd edn, by J. O' Donovan, it is stated (at p. 84 – (d) Service) that: "After filing, the application must be served on the company at its registered office by leaving it there …".

We have also to be mindful that the petitioner's statutory demand and, subsequently, the petition were preceded by a letter of demand to which the respondent had replied (exh. TTK 4 encl. 12A). Indeed, the petition was also faxed by petitioner's solicitors to the Respondent's solicitors upon the latter's request, in respect of which the former received the appreciative response: "We thank your Mr. Chan for having forwarded a copy of the petition *via* fax to us on 10 October 2003." Thus, respondent was forewarned that the petitioner would be commencing legal action against them when they failed to comply with the statutory demand.

If I am wrong on the construction of r. 25(1), I think it is appropriate here, considering the above distinctive circumstances, to invoke r. 194(1) of the Rules which provides that:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

I am satisfied that there is adequate proof of physical delivery of both the statutory demand and the petition on the respondent. There has been no injustice or prejudice occasioned to the respondent, by the petitioner effecting service of both the statutory demand and the petition by leaving copies of the same at the respondent's registered office. I hold that nothing much turns on Nagian's failure to get the petitioner's member, officer, or servant to acknowledge receipt of the petition. (See *Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd* [1994] 3 CLJ 511 and *Cymun Development Sdn Bhd v. Supermax Sdn Bhd* [1996] 1 CLJ 545.)

Second Issue – The Debt

Our statutory courts are now inundated with winding-up petitions (also applications for injunctions to restrain winding-up petitions) to exert pressure for a collateral objective, which has been very aptly described, even as early as 1883 (which only serves to demonstrate how immutable human conduct could be) by Bowen LJ in the English Court of Appeal case of *Quartz Hill Consolidated Gold Mining Company v. Eyre* [1883] Vol XI 674 in the following language:

> I suppose that most of the lawyers of the present day have seen great increase of three kinds of abuses, all of which are indulged in for the purpose of extorting payment of some debt, which ought to be the subject of some civil redress.

(See also *Re Bellador Silk Ltd* [1965] 1 All ER 667 and also *Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd* [2002] 3 AMR 2647 (Lotan Engineering) and *Stonegate Securities Ltd v. Gregory* [1980] 1 Ch 576 CA.)

As only a creditor may petition to the court for winding-up under s. 218(1)(e) of the Act the court must first determine the question of his *locus standi* to institute the petition. This entails determination of the primary question whether the petitioner is a genuine creditor. As I have said in several of my earlier judgments, the enquiry as to solvency of the company would only follow if the primary question is resolved with an affirmative answer. And, whether he is a creditor depends on whether the debt is due. A person cannot be said to be a creditor, that is, one to whom a debt is owing, where the alleged debt is substantially disputed (see *Goldstien* (infra) and *Juranas* (infra)), or the claim or judgment debt is time barred. (See *Wangsiru Sdn Bhd v. Grand United Holdings* [1997] 5 CLJ 664.) And, even a default judgment is a good and enforceable judgment until set aside. (See *Pembinaan K.S.Y. Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343.) Though, it is more prudent that the petitioner files his petition after crystallization of a claim into a judgment debt (see *Dayakuasa Holdings Sdn Bhd v. Kayaal Holdings Sdn Bhd* [2003] 2 CLJ 391), it is trite law that a petitioner may also proceed to wind up a company without a judgment debt.

Thus, in *Mann & Anor v. Goldstien & Anor* [1968] 1 WLR 1091 (Goldstien), the English court, in construing s. 223 of the Companies Act 1948 (United Kingdom), which is in *pari materia* with out s. 218(2) held:

> That a creditor's winding up petition could only be presented by a creditor and since the debts upon which both the defendants founded their petitions were substantially disputed, neither of the petitioners were established as 'creditors' of their two companies; and that, accordingly, neither was entitled to present a petition as neither had any *locus standi* in the companies court. Even though it appeared from the evidence that the companies were insolvent, as the debts were substantially disputed the defendants ought to be restrained from proceeding on the petition.

Similarly in *Re Lympne Investment* [1972] 2 All ER 385, it was held:

> … that when a petition was based on a debt which was disputed, on substantial grounds, the petitioner was not a creditor within section 224(1) of the Companies Act 1948 who had the locus standi requisite for the presentation of a petition even if the company was, in fact insolvent; that the existence of a dispute on substantial grounds as to the existence of any debt defeated the contention that the company has, within section 223(a) 'neglected' to pay the sum required by statutory demand and that, accordingly, the petition should in accordance with the modern practice be dismissed. (See also *Lotan Engineering*.)

In *Goldstien* it was also held that the court has inherent jurisdiction to restrain the filing of a winding-up petition. (See also *CVC Investment Pty Ltd & Anor v. P&T Aviation Limited* [1989] NSW LR 295.)

Hence, it follows that where the petitioner is a genuine creditor within the meaning of s. 218(2)(a) of the Act its motives to wind up the company would be irrelevant. (See *Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd* [1995] 5 CLJ 145, *Re Sanpete Builders (S) Pte Ltd* [1989] 1 CLJ 562; [1989] 2 CLJ (Rep) 958.) Also a 'debt' is one which can be ascertained or which is a readily quantifiable amount. (See *Commissioner Wealth Tax v. Harrison and Crossfield Ltd* AIR [1965] 209 and also *Chang Chan Thong v. Kemajuan Sri Segera Sdn Bhd* [1996] 2 CLJ 471.)

The petitioner made valiant attempts to keep the surrounding facts giving rise to the presentation of this petition simple. He averred that the sum of RM408,000 was an outright loan and that the respondent was unable to repay the same when demanded to do so. For this reason, he submitted that the respondent had failed to rebutt the presumption of insolvency under s. 218(2)(a) of the Act and should therefore be wound up.

It is common ground that the petitioner did give the respondent a loan of RM408,000. This much is obvious from the respondent's own confirmation of this debt to their auditors, Messrs Kassim, Chan & Co, *vide* a 'Confirmation of Balances' dated 21 January 2002 (exh. B encl. 1). I found that this was but a piece of the whole jigsaw puzzle that represents the relationship between the parties. The respondent provided the complete picture.

The petitioner was a shareholder cum director, with a 2% shareholding in the respondent whilst one Tung Ah Leek (Tung), who was also a shareholder with 2% shareholding cum managing director of the respondent, was the supporting creditor. The remaining 96% in the respondent was held by other shareholders cum directors, who oppose this petition.

The respondent had a paid up capital of RM7 million, which was insufficient to finance their plans to purchase lands for housing development projects. The shareholders cum directors, including the petitioner and Tung, came to an understanding that they would each give advances to the respondent, proportional to their shareholding, to finance this undertaking and subsequently to be used as working capital to carry out the housing development projects. As at 31 December 2000, these advances amounted to over RM25 million (exh. TTK 1A encl. 12A). The petitioner and Tung had, by this time, each contributed RM408,000.

Throughout their tenure as director and managing director respectively, neither the petitioner nor Tung ever demanded or requested the repayment of their advances. They knew that these advances would be tied down as assets in various forms. By virtue of their aforesaid earlier designation in the respondent, it is inevitable that both the petitioner and Tung knew that any questioning of the understanding or arrangement in respect of these advances, would in essence be questioning their very own actions. This is consistent with the respondent's submission that the petitioner was aware that the advance he gave would only become 'due and payable' when there were surplus funds in the respondent. Both the petitioner and Tung did not seek the repayment of their advances until after they had resigned from the board of directors of the respondent.

When viewed in the context of the factual matrix presented by the respondent, I hold that the petitioner's contention, that the sum of RM408,000 was a clear and outright debt, is flawed. There is no doubt in my mind that there is a *bona fide* dispute as to whether the said advance had become a due and payable debt to the petitioner and I need do no more than refer to the judgment of Justice To in *Lee Po Wang, Samson v. Ever Rise Engineering Ltd* [2002] 555 HKCU 1, who intoned the following words, strangely apposite to the case at hand, much of which I could have borrowed:

a There is no dispute that the debt was owed to the Petitioner and that the Company failed to comply with the statutory demand to pay the debt. The Respondent opposes the Petition on the ground that the loans were shareholder's loans and are not repayable on demand. …

b Looking at the reality of the situation, not only that he has never made a repayment until 19 May 2001 when he left the company, he lent the company another $1 million ten months after he joined the company. These are consistent with Chan's evidence that the petitioner joined the company on the understanding that shareholders would be required to provide working capital for the company by way of shareholders' loan and inconsistent with the petitioner's evidence that the debt assigned was repayable on demand. …

c Given the nature and size of its operation as a building services and engineering company, its paid up capital is unrealistic. *It can be readily inferred that the shareholders loan must form a significant part of its working capital. These are not ordinary loans but are in reality working capital for the Company. Working capital is not liquid cash and would usually be tied down in various forms.* In the case of the Company, it may be tied down as work in progress or as security deposits paid under engineering contracts. *Even in the absence of express agreement, it can readily be inferred that loans advanced as working capital are not repayable on demand.* Hence, Chan's evidence that when the Petitioner acquired the shares and was assigned a loan of $600,000.00 he knew and agreed with Chan that *the loan was to provide working capital for the Company and was not repayable on demand but as and when the Company was able to do pay is highly credible and accords with business sense.* … (emphasis added).

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f An added factor to bear in mind is that the respondent has deposited a sum of RM816,000 in the form of a bank draft with their solicitors to meet both the petitioner's and Tung's demands (exh. D encl. 21), laying to rest any questions as to their solvency or ability to pay this alleged debt, even though the question of solvency need not be decided as I have found that the petitioner is not a genuine creditor – indeed, not a creditor in any sense of the word.

g **Conclusion**

As I have said before, "the crucial question this court should ask itself is: are there any triable issues which would entail this statutory winding court being converted into a common law trial court during the hearing of this petition? And if the answer is in the affirmative, the petition should be dismissed." (See h *Malaysian Resources Corporation Bhd v. Juranas Sdn Bhd* [2002] 7 CLJ 260 (Juranas).)

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In light of the potent evidence adduced by the respondent in opposing this petition, I find that the answer to this question is in the affirmative. The triable issue is whether the advances are due and repayable on demand or were they merely a shareholder's advance to provide working capital for the respondent which were repayable at a future date contingent upon the state of performance of the respondent's property venture. Clearly, under the circumstances of this case, unless the advances constituted a genuine debt due, the petitioner is not clothed with *locus standi* as a creditor to file this petition. This petition is an abuse of the process of court and accordingly encl. 1 was dismissed with costs.

I conclude with the oft-quoted judgment of Meggary J in *In Re Lympe Investments Ltd* [1972] 2 All ER 385:

> **A real dispute**, turning to a substantial extent on disputed questions of fact which require viva voce evidence, … **cannot properly be decided on petition.** Nor is it right or in accordance with modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. … **The companies court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a company.** The effect on a company of the presentation of a winding up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while the litigation is fought out. (emphasis added).